



[4337-15-P]

## DEPARTMENT OF THE INTERIOR

### Bureau of Indian Affairs

#### 25 CFR Part 30

[167 A2100DD / AAKC001030 / A0A501010.999900]

### Notice of Intent to Establish a Negotiated Rulemaking Committee

**AGENCY:** Bureau of Indian Education, Interior.

**ACTION:** Notice of intent; request for nominations for tribal representatives; and comments.

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**SUMMARY:** The Bureau of Indian Education (BIE) is announcing its intent to establish an Accountability Negotiated Rulemaking Committee (Committee). The Committee will recommend revisions to the existing regulations for BIE's accountability system. As required by applicable statutes, the Secretary will select representatives of Indian tribes for the Committee from among individuals nominated by tribes whose students attend BIE-funded schools operated by either the BIE or by the tribe through a contract or grant and who would be affected by a final rule. The BIE also solicits comments on the proposal to establish the Committee, including comments on additional interests not identified in this notice of intent, and invites tribes to nominate representatives for membership on the Committee.

**DATES:** Submit nominations for Committee members or written comments on this notice of intent on or before [INSERT 45 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit nominations for Committee members or written comments on this notice of intent by any of the following methods:

- Send comments or nominations to Ms. Sue Bement, Designated Federal Officer, Bureau of Indian Education, 1011 Indian School Road NW., Suite 332, Albuquerque, New Mexico, 87104; email: AYPcomments@bia.gov; Telephone: (505) 563-5274; Fax: (505) 563-5281; or
- Hand-carry comments or use an overnight courier service to Manuel Lujan Jr. Building, Building II, Suite 332, 1011 Indian School Road N.W., Suite 332, Albuquerque, New Mexico 87104.

**FOR FURTHER INFORMATION CONTACT:** Ms. Sue Bement, Designated Federal Officer; Telephone: (505) 563-5274; Fax (505) 563-5281.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

Under the Elementary and Secondary Education Act of 1965 (ESEA), student achievement data is used to determine whether schools are successfully educating their students. Under current law, this accountability measure is Adequate Yearly Progress (AYP). The law requires States to use a single accountability system for schools to determine whether all students, as well as individual subgroups of students, are making progress toward meeting State academic content standards. The goal, as stated in the ESEA, was to have all students reaching proficient levels in reading and math by 2014 as measured by performance on State tests. The ESEA requires the Bureau of Indian Affairs to promulgate regulations through negotiated rulemaking for the accountability system to be used in Bureau-funded schools. See 20 U.S.C. 6316(g)(1)(A)(i); 25 U.S.C. 2017-2018.

In 2005, BIA promulgated such regulations. *See* 70 FR 22178 (April 28, 2005). These regulations, codified at 25 CFR 30.104, require BIE to use the accountability system of the State in which a BIE-funded school is located.

The BIE-funded schools are located in 23 different States; and each State has its own accountability system. As a result, each State system produces student achievement data that cannot be directly compared with data from other States. For BIE, comparison is necessary to identify under-performing schools and direct resources effectively. Regardless of whether AYP continues to be the accountability measure required under law, BIE must address this deeply fragmented accountability system through negotiated rulemaking to create a more cohesive accountability system.

The BIE had previously developed a method for comparing academic achievement across States despite the variances in academic standards. Beginning in 2011, the U.S. Department of Education began to grant flexibility waivers to States for certain provisions of ESEA, which has complicated the method BIE uses to effectively compare achievement. It is necessary, therefore, to revise 25 CFR Part 30, and to receive recommendations from a negotiated rulemaking committee on how BIE can compare academic achievement across the 23 States.

This rulemaking would not change the existing authority for tribes to adopt their own tribal definition of AYP. The BIE encourages tribal self-determination in Native education, encouraging tribes to develop alternative accountability systems (and definitions of AYP) and providing technical assistance. For example, on June 1, 2015, U.S. Education Secretary Arne Duncan and Interior Secretary Sally Jewell announced that the Miccosukee Indian School received flexibility from the Elementary and Secondary Education Act (ESEA) to use a

definition of AYP that meets their students' unique academic and cultural needs. Local tribal communities know best what their children need, and BIE prioritizes tribal self-determination in Indian education. This rulemaking aims only to make the existing system more effective and efficient. It would impact only those BIE-funded schools that do not wish to develop alternative definitions of AYP, though the option will remain open to them regardless.

In 2012, BIE conducted four regional meetings on the topic of accountability in BIE-funded schools. Meetings were held in Oklahoma City, Oklahoma, on July 17, 2012; Flagstaff, Arizona, on July 20, 2012; Seattle, Washington, on July 24, 2012; and Bismarck, North Dakota, on July 27, 2012. Transcripts of those meetings can be referenced at <http://www.bie.edu/consultation/index.htm>.

During the four meetings, BIE received feedback from the tribes on the ESEA Flexibility Request and the BIE's proposed flexibility waiver. At the consultation sessions, BIE and the tribes discussed adopting Common Core standards – initially in reading, language arts, and mathematics – to reflect tribal values and employ a single assessment system for all BIE-funded schools.

## **II. Statutory Provisions**

The Negotiated Rulemaking Act of 1996 (NRA) (5 U.S.C. 561 *et seq.*); the Federal Advisory Committee Act (FACA) (5 U.S.C. Appendix 2); and the NCLB (20 U.S.C. 2000 *et seq.*)

## **III. The Committee and Its Process**

In a negotiated rulemaking, recommended provisions of a proposed rule are developed by a committee composed of at least one representative of the Federal Government and representatives of the interests that will be significantly affected by the rule. Decisions are made by consensus, which means unanimous concurrence among the interests represented on the Committee, unless the Committee agrees to define “consensus” to mean a general but not unanimous concurrence, or agrees upon another specified definition. 5 U.S.C. 562(2)(A) and (B).

As part of the negotiated rulemaking process, BIE has identified interests potentially affected by the rulemaking under consideration, including students enrolled at 174 BIE-funded schools, parents of such students, school administrators, Tribes, and the Indian communities served by these schools. By this notice of intent, BIE is soliciting: (1) comments on its proposal to form a negotiated rulemaking committee; and (2) nominations for Committee members who will adequately represent the interests that are likely to be significantly affected by the proposed rule.

Following the receipt of nominations and comments, BIE will publish a second notice in the **Federal Register** with a list of persons to represent the interests that are likely to be significantly affected by the rule, and the person or persons proposed to represent BIE. Persons who will be significantly affected by the proposed rule and who believe that their interests will not be adequately represented by any person specified in that second **Federal Register** notice will be given an opportunity to apply or nominate another person for membership on the negotiated rulemaking committee to represent such interests with respect to the proposed rule.

Following the second **Federal Register** notice and responses to it, BIE expects to establish the Committee. After the Committee reaches consensus on the recommended

provisions of the proposed rule, as discussed in more detail below, BIE will publish a proposed rule in the **Federal Register**.

Under 5 U.S.C. 563, the head of the agency is required to determine that the use of the negotiated rulemaking procedure is in the public interest.

In making such a determination, the agency head must consider certain factors. Taking these factors into account, the Secretary, through the authority delegated to the Assistant Secretary – Indian Affairs, has determined that a negotiated rulemaking is in the public interest because:

1. A rule is needed. The ESEA directs the Secretary to conduct a negotiated rulemaking pursuant to the NRA. The current definition of AYP creates a fragmented accountability system that prevents the BIE from developing and implementing comprehensive school reform initiatives in the 174 BIE-funded schools with academic programs in 23 States.

2. A limited number of identifiable interests will be significantly affected by the rule. The 174 BIE-funded schools, students enrolled at these schools, school teachers and administrators, tribes, and Indian communities served by these schools will be significantly affected by this review and the recommendations made by this Committee.

3. There is a reasonable likelihood that the Committee can be convened with a balanced representation of persons who can adequately represent the interests discussed in item 2, above, and who are willing to negotiate in good faith to attempt to reach a consensus on provisions of a proposed rule.

4. There is a reasonable likelihood that the Committee will reach consensus on a proposed rule within a fixed period of time.

5. The use of negotiated rulemaking will not unreasonably delay the development of a proposed rule because time limits will be placed on the negotiation. We anticipate that these negotiations will expedite a proposed rule and ultimately the acceptance of a final rule.

6. The BIE is making a commitment to ensure that the Committee has sufficient resources to complete its work in a timely fashion.

7. The BIE, to the maximum extent possible and consistent with the legal obligations of the Agency, will use the consensus report of the Committee as the basis for a proposed rule for public notice and comment.

#### **IV. Negotiated Rulemaking Procedures**

In compliance with FACA and NRA, BIE will use the following procedures and guidelines for this negotiated rulemaking. The BIE may modify them in response to comments received on this notice of intent or during the negotiation process.

##### *A. Committee Formation*

The Committee will be formed and operated in full compliance with the requirements of FACA and NRA, and specifically under the guidelines of its charter.

##### *B. Membership Responsibility*

The Committee is expected to meet approximately 3-5 times. The meetings will be held at various locations across Indian Country, and will last 2-3 days each. The initial meeting will

be in person; some later meetings may be held by teleconference and/or web-conference. The Committee's work is expected to occur over the course of 6-12 months. However, the Committee may continue its work for a duration of two years.

Because of the scope and complexity of the tasks at hand, committee members must be able to invest considerable time and effort in the negotiated rulemaking process. Committee members must be able to attend all committee meetings, work on committee work groups, consult with their constituencies between committee meetings, and negotiate in good faith toward a consensus on issues before the Committee. Because of the complexity of the issues under consideration, as well as the need for continuity, the Secretary reserves the right to replace any member who is unable to participate in the Committee's meetings.

Responsibility for expenses is stated under 5 U.S.C. 568(c) as follows:

Members of a negotiated rulemaking committee shall be responsible for their own expenses of participation in such committee, except that an Agency may, in accordance with section 7(d) of the FACA, pay for a member's reasonable travel and per diem expenses, expenses to obtain technical assistance, and a reasonable rate of compensation, if—

1. Such member certifies a lack of adequate financial resources to participate in the Committee; and
2. The agency determines that such members participation in the Committee is necessary to assure an adequate representation of the members interest.

The BIE commits to pay the reasonable travel and per diem expenses of Committee members, if appropriate under the NRA and Federal travel regulations.



### *C. Composition of Committee*

The Secretary is seeking nominations submitted by Tribes for tribal representatives, consistent with the provisions of 25 U.S.C. 2018, to serve on the Committee, who have a demonstrated ability to communicate well with groups about the interests they will represent. The Committee cannot exceed 25 members, and BIE prefers 15.

Tribal Committee membership must:

- Include only representatives of Tribes served by BIE-funded schools;
- Be selected from among individuals nominated by the Tribes that have students attending BIE-funded schools;
- Reflect the proportionate share of students from Tribes served by the BIE-funded school system; and
- Comply with the FACA

Section 2018 of Title 25 also requires the Secretary to ensure that the various interests affected by the proposed report(s) or rules be represented on the Committee. In making membership decisions, the Secretary shall consider whether the interest represented by a nominee will be affected significantly by the final products of the Committee, which may include report(s) and/or proposed regulations; whether that interest is already adequately represented by tribal nominees; and whether the potential addition would adequately represent that interest. Federally registered lobbyists are ineligible to serve on all FACA and non-FACA boards, committees, or councils in an individual capacity. The term “individual capacity” refers to individuals who are appointed to exercise their own individual best judgment on behalf of the

government, such as when they are designated Special Government Employees, rather than being appointed to represent a particular interest.

#### *D. Administrative and Technical Support*

The BIE will provide sufficient administrative and technical resources for the Committee to complete its work in a timely fashion. The BIE, with the help of the facilitator, will prepare all agendas, provide meeting notes, and provide a final report of any issues on which the Committee reaches consensus.

#### *E. Training and Organization*

At the first meeting of the Committee, a neutral facilitator will provide training on negotiated rulemaking, interests-based negotiations, consensus-building, and team-building. In addition, at the first meeting, Committee members will make organizational decisions concerning protocols, scheduling, and facilitation of the Committee.

#### *F. Interests Identified Through Consultation*

Under Section 562 of the NRA, “ ‘interest’ means, with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner.” The BIE has consulted with BIE personnel and educators at BIE-funded schools. Through these and previous consultations, such as those conducted in 2012 for an Elementary and Secondary Education Act Flexibility Waiver Request, BIE has identified interests to be significantly affected by this new rule that include students enrolled at 174 BIE-funded schools, parents of such students, school administrators, tribes, and the Indian communities served by these schools. The BIE is accepting comments identifying other interests that may be

significantly affected by the final products of the Committee, which may include report(s) and/or proposed regulations, until the date listed in the DATES section of this notice of intent.

## V. Request for Nominations and Comments

The BIE solicits nominations from tribes whose students attend BIE-funded schools operated either by BIE or by the tribe through a contract or grant, to nominate tribal representatives to serve on the Committee and tribal alternates to serve when the representative is unavailable. Based upon the proportionate share of students, some tribes similar in affiliation or geography are grouped together for one seat. It will be necessary for such nominating tribes either to co-nominate a single tribal representative to represent the multi-tribal jurisdiction or for each tribe in the multi-tribal jurisdiction to nominate a representative with the knowledge that BIE will be able to appoint only one of the nominees who will then be responsible for representing the entire multi-tribal jurisdiction on the Committee. (See chart below for jurisdictions.)

<b>Tribes</b>	<b>Student Count School Year 2013-2014</b>	<b>Percent of Total Student Count</b>	<b>% Times 15 Seats Total</b>	<b>Suggeste d Seats</b>
Navajo Nation Tuba City Agency Western (AZ)	3,727	-----	-----	-----
Navajo Nation Crown Point Agency Eastern (NM)	3,642	-----	-----	-----
Navajo Nation Chinle Agency (AZ)	3,216	-----	-----	-----
Navajo Nation Fort Defiance Agency (AZ)	2,437	-----	-----	-----
Navajo Nation Shiprock Agency (AZ)	1,870	-----	-----	-----
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Total Navajo Nation	14,892	32.70%	4.91	5
Oglala Sioux Tribe of the Pine Ridge Reservation(SD)	2,994	-----	-----	-----
Cheyenne River Sioux (SD)	1,280	-----	-----	-----
Rosebud Sioux Tribe (SD)	896	-----	-----	-----
Standing Rock Sioux Tribe (ND)	989	-----	-----	-----
Sisseton-Wahpeton Sioux of Lake Traverse Res. (SD)	797	-----	-----	-----

Spirit Lake Tribe (Devils Lake Sioux Tribe) (ND)	615	----- -----	----- -----	----- -----
Total Sioux Tribes	7,571	16.63%	2.49	2
The Hopi Tribe (AZ)	1,465	-----	-----	-----
Pueblo of Acoma	251	-----	-----	-----
Pueblo of Chochiti	23	-----	-----	-----
Pueblo of Isleta	175	-----	-----	-----
Pueblo of Jemez	165	-----	-----	-----
Pueblo of Laguna	386	-----	-----	-----
Pueblo of Nambe	12	-----	-----	-----
Pueblo of Picuris	5	-----	-----	-----
Pueblo of Pojoaque	5	-----	-----	-----
Pueblo of San Felipe	447	-----	-----	-----
Pueblo of San Ildefonso	38	-----	-----	-----
Pueblo of San Juan	171	-----	-----	-----
Pueblo of Sandia	2	-----	-----	-----
Pueblo of Santa Ana	7	-----	-----	-----
Pueblo of Santa Clara	134	-----	-----	-----
Pueblo of Santo Domingo	210	-----	-----	-----
Pueblo of Taos	151	-----	-----	-----
Pueblo of Tesuque	43	-----	-----	-----
Pueblo of Zia	84	-----	-----	-----
Total Hopi and Pueblo Tribes	3,774	8.29%	1.24	1
Bad River Band of the Lake Superior Tribe (WI)	10			
Bay Mills (MI)	11	-----	-----	-----
Chippewa-Cree (MT)	24	-----	-----	-----
Grand Traverse Band of Ottawa & Chippewa (MI)	4	-----	-----	-----
Keweenaw Bay of L'Anse and Ontonagon of Chippewa (MI)	1	-----	-----	-----
Lac Courte Oreilles of Lake Superior Chippewa (WI)	227	-----	-----	-----
Lac du Flambeau of Lake Superior Chippewa (WI)	13	-----	-----	-----
Minnesota Chippewa Bois Forte Band (Nett Lake)	18	-----	-----	-----
Minnesota Chippewa Fond du Lac Band	167	-----	-----	-----
Minnesota Chippewa Leech Lake Band	143	-----	-----	-----
Minnesota Chippewa Mille Lacs Band	207	-----	-----	-----
Minnesota Chippewa Red Lake of Chippewa Indians	75	-----	-----	-----
Minnesota Chippewa Tribe, MN - 6 reservations	17	-----	-----	-----
Minnesota Chippewa White Earth Band	146	-----	-----	-----
Red Cliff Band of Lake Superior Chippewa Indians (WI)	11	-----	-----	-----
Saginaw Chippewa (MI)	4	-----	-----	-----
Sault Ste. Marie Tribe of Chippewa Indians (MI)	285	-----	-----	-----
Sokaogon Chippewa of Mole Lake Band (Chippewa) (WI)	3	-----	-----	-----
St. Croix Chippewa Indians (WI)	12	-----	-----	-----

Turtle Mountain Band of Chippewa Indians (ND)	2,089	----- ----- --	----- ----- --	----- ----- -----
Total Chippewa Tribes	3,467	7.61%	1.14	1
Gila River	1,094	-----	-----	-----
White Mountain Apache of Fort Apache	975	-----	-----	-----
Tohono O'odham Nation	924	-----	-----	-----
Mescalero Apache	549	---	---	---
Total	3,542	7.78%	1.17	1
Mississippi Band of Choctaw Indians (MS)	2,168	-----	-----	-----
Eastern Band of Cherokee Indians (NC)	1,040	--	--	-
Total	3,208	7.04%	1.06	1
Total Other Tribes	12,492	27.43%	4.11	4
Total 2013-2014 Student Count	45,537	----- -	----- -	----- -
Federal Government – Committee Membership		Designated Federal Officer		1
		Office of the Solicitor		1
		Bureau of Indian Education		1
		Department of Education		1
Total Tribal Committee Members				15
Total Federal Committee Members				4
TOTAL AYP Negotiated Rulemaking Committee				19

Each nomination is expected to include a nomination for a representative and an alternate who can fulfill the obligations of membership should the representative be unable to attend. The Committee membership should also reflect the diversity of tribal interests, and tribes should nominate representatives and alternates who will:

- Have knowledge of school assessments and accountability systems;
- Have relevant experience as past or present superintendents, principals, teachers, or school board members, or possess direct experience with AYP;

- Be able to coordinate, to the extent possible, with other tribes and schools who may not be represented on the Committee;
  - Be able to represent the tribe(s) with the authority to embody tribal views, communicate with tribal constituents, and have a clear means to reach agreement on behalf of the tribe(s);
  - Be able to negotiate effectively on behalf of the tribe(s) represented;
  - Be able to commit the time and effort required to attend and prepare for meetings;
- and
- Be able to collaborate among diverse parties in a consensus-seeking process.

## **VI. Submitting Nominations**

This notice was previously published in the Federal Register on January 31, 2013. The evaluation of nominations received as a result of the previous notice were conducted and validated for one year, expiring January 31, 2014. Representatives who were previously nominated would need to be re-nominated in response to this notice. The Secretary will only consider nominees nominated through the process identified in this **Federal Register** notice. Nominations received in any other manner will not be considered. Nominations must include the following information about each nominee:

- (1) A letter from the Tribe supporting the nomination of the individual to serve as a tribal representative for the Committee;
- (2) A resume reflecting the nominee's qualifications and experience in Indian education; resume to include the nominee's name, tribal affiliation, job title, major job duties,

employer, business address, business telephone and fax numbers (and business email address, if applicable);

(3) The tribal interest(s) to be represented by the nominee (see Section IV, Part F of this notice of intent) and whether the nominee will represent other interest(s) related to this rulemaking, as the tribe may designate; and

(4) A brief description of how the nominee will represent tribal views, communicate with tribal constituents, and have a clear means to reach agreement on behalf of the tribe(s) they are representing.

Additionally, a statement on whether the nominee is only representing one tribe's views or whether the expectation is that the nominee represents a specific group of tribes.

To be considered, nominations must be received by the close of business on the date listed in the **DATES** section, at the location indicated in the **ADDRESSES** section.

### **Certification**

For the above reasons, I hereby certify that the Adequate Yearly Progress Negotiated Rulemaking Committee is in the public interest.

Dated: October 29, 2015.

Kevin K. Washburn,  
Assistant Secretary – Indian Affairs.  
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